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No. 87-847

In the Supreme Court of the United States

OCTOBER TERM, 1987

ASA RICHARD TALBOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order of the district court, which had dismissed an indictment on the ground that it was returned to avoid the speedy trial rules applicable to prosecutions in military courts.

Petitioner was a United States Army doctor. In August 1985, charges were preferred against petitioner under the Uniform Code of Military Justice. Petitioner was alleged to have sexually molested two young female patients in the course of his service as a physician at the Blanchfield Army Community Hospital in Tennessee. After various pretrial proceedings, petitioner's military trial was scheduled for January 18, 1986. Prior to trial, petitioner filed a motion to dismiss the military charges with prejudice because of a violation of the military speedy trial rules. Shortly after that motion was filed, the military prosecutors dismissed the military charges against petitioner and referred the case to the United States Attorney. On February 19, 1986, petitioner was indicted by a federal grand jury; he was charged with sexually assaulting the

two female patients within the maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 113. Pet App. 1-9.

Petitioner moved to dismiss the indictment on the ground that his speedy trial, due process, and double jeopardy rights were violated by the initiation of civilian charges after he had previously been charged with similar offenses by the military in connection with the assaults. The district court granted the motion. The court held that the 120-day speedy trial limitation found in the Rules for Courts-Martial had commenced to run in June 1985, when petitioner's commanding officer relieved petitioner from his duties as a medical officer, designated his living quarters as a duty station, and directed him to avoid contacts with any witnesses. Accordingly, the district court found, a military speedy trial violation had subsequently occurred prior to the date set for petitioner's military trial. The court ruled that the military prosecutors had acted in bad faith when they referred the case to the United States Attorney's office, because they had acted, in the court's view, in order to avoid an unfavorable ruling by the military court on petitioner's speedy trial motion. That action by the military prosecutors tainted the grand jury, the court held, and thus required that the indictment be dismissed. Pet. App. 9-10.

The court of appeals reversed (Pet. App. 1-19). The court first noted that it is well established that military and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing in the circumstances presented by the instant case (*id.* at 10-12). The court pointed out that prosecuting authorities have wide latitude in dismissing criminal actions without violating due process and that a defendant is entitled to the extreme sanction of dismissal of an indictment only where he can show that he was demonstrably prejudiced by a constitutional violation (*id.* at 14-15). The court concluded

that the federal civilian prosecution did not violate either petitioner's due process or constitutional and statutory speedy trial rights (*id.* at 16-18). The court also found no double jeopardy violation because petitioner had never been put in jeopardy in the military system (*id.* at 12).

Petitioner contends (Pet. 15-45) that the district court properly found a due process violation and dismissed the indictment because it was returned by civilian authorities for the express purpose of avoiding an expected adverse ruling by the military court that petitioner's military speedy trial rights had been violated. Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current claim to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1987

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if this Court requests.

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